

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In Re:	§	
DEEP MARINE HOLDINGS, INC.,	§	Case No. 09-39313
et al.	§	
	§	Jointly Administered
Debtors.	§	Chapter 11
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DEEP MARINE HOLDINGS, INC.,	§	
and DEEP MARINE TECHNOLOGY	§	
INCORPORATED	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Adversary No. 10-03026
FLI DEEP MARINE LLC, BRESSNER	§	
PARTNERS LTD., LOGAN LANGBERG	§	
HARLEY LANGBERG, AND	§	
DEEPWORK, INC.	§	
	§	
Defendants.	§	
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**DEBTORS' SURREPLY TO DEFENDANTS' REPLY TO MOTION OF PAUL MCKIM
FOR ENTRY OF ORDER REGARDING SUBPOENA AND DEBTORS'
OBJECTION/RESPONSE TO THE MOTION
(Relates to Doc. No. 45)**

The above-captioned debtors and debtors-in-possession, the plaintiffs in this adversary proceeding (together, the "Debtors"), by and through their undersigned attorneys, respectfully file this surreply to the Defendants' Reply to Motion of Paul McKim for Entry of Order Regarding Subpoena and Debtors Objection/Response to the Motion, and would show as follows:

1. First, the subpoena for the 2009 report of the Special Committee of Deep Marine Holdings, Inc. and/or Deep Marine Technology Incorporated (the "SLC Report") issued to Paul McKim by the Defendants is a blatant attempt to circumvent the ruling of the Texas state district

court in *McKim v. Kazeminy et al.*, Cause No. 2008-64385, pending in the 129th Judicial District Court in Harris County, Texas (the "Texas Action"). Essentially, after the Texas Action (i.e. the derivative claims brought by Paul McKim) was dismissed, the Deep Marine entities initiated a proceeding against Paul McKim under Texas Business Organization Code § 21.561 in order to recoup the expenses of defending Paul McKim's original suit. The SLC Report was provided to Paul McKim under an agreed protective order signed by the court in the § 21.561 proceeding so that Paul McKim could have the opportunity to argue that his original claims in the Texas Action were not frivolous. The § 21.561 proceeding has not been concluded. Paul McKim should not be able to turn over the SLC Report which he has only come into possession of under court ordered confidentiality because he has been sued for bringing a frivolous action against certain of the Debtors. Defendants seek to use the subpoena power of this Court to violate an agreed protective order of the Texas state district court.

2. Second, the Debtors have provided the Defendants with each and every document that was relied upon by counsel to the Special Litigation Committee in drafting the SLC Report. The SLC Report is simply the conclusions drawn by Debtors' attorneys based on such documents. The Defendants now have such documents and can draw their own conclusions. Thus, the Defendants' claim that "it is vital for them to review a copy of the Report ... if they are to be able to fully make their case regarding ownership of the claims" is simply disingenuous. The Defendants have every single document that the Special Litigation Committee looked at in drafting the SLC Report.

3. Third, the SLC Report has no relationship whatsoever to the matters in dispute in this adversary. Despite the Defendants best efforts to cloud the issue, the point of this adversary proceeding is to determine ownership of the Delaware Causes of Action. The validity of the

underlying facts of the Delaware Causes of Action are irrelevant. The SLC Report is an analysis conducted into the assertions made and matters raised in the Shareholder Demand Letter dated October 10, 2008. That letter is attached hereto as **Exhibit A**. As one can see from the letter (signed by Mr. Paduano), it complains of "serious breaches of fiduciary duty by certain employees, officers and directors of DMT and others who have diverted and/or misappropriated corporate assets ... *causing substantial injury to the corporation.*" (Exhibit A) (emphasis added). Mr. Paduano's letter concludes by stating "As a result of the foregoing wrongdoing and breached of duty, *DMT has sustained damages totaling millions of dollars.* On behalf of the Investors, we demand that DMT establish a Special Litigation Committee and immediately *take action to recover the damages sustained by DMT as a result of the misconduct described herein....*" (Exhibit A) (emphasis added). I.e. the SLC Report focuses on the facts underlying the derivative claims set out in Mr. Paduano's October 10, 2008 letter. As the Debtors have proclaimed *ad nauseam*, the facts underlying the Delaware Causes of Action are not suitable for discovery. The Debtors stipulate to the truth of such facts for the purposes of the preliminary injunction. Nonetheless, Defendants insist on trying to prosecute claims that do not belong to them by propounding inappropriate discovery.

WHEREFORE, premises considered, the Debtors respectfully request that this Court enter an order prohibiting the production of the SLC Report and granting such other relief as the Court deems appropriate.

BRACEWELL & GIULIANI LLP

By: /s/ Marcy E. Kurtz
Marcy E. Kurtz
Texas Bar No. 11768600
Marcy.Kurtz@bgllp.com
William A. (Trey) Wood III
Texas Bar No. 21916050
Trey.Wood@bgllp.com
Jason G. Cohen
Texas Bar No. 24050435
Jason.Cohen@bgllp.com
Bracewell & Giuliani LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: (713) 223-2300
Facsimile: (713) 221-1212

ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served upon the parties listed below by electronic mail on February 8, 2010.

/s/ Jason G. Cohen
Jason G. Cohen

Laurie Schenker Polleck
lpolleck@jshllp-de.com
JASPAN SCHLESINGER HOFFMAN LLP
913 N. Market Street
Wilmington, Delaware 19801

Kurt M. Heyman
kheyman@proctorheyman.com
Patricia L. Enerio
penerio@proctorheyman.com
PROCTOR HEYMAN LLP
1116 N. West Street
Wilmington, Delaware 19801

Anthony Paduano
ap@pwlawyers.com
Katherine B. Harrison
kh@pwlawyers.com
Jason J. Snyder
jjs@pwlawyers.com
Jordan Becker
jdb@pwlawyers.com
PADUANO & WEINTRAUB LLP
1251 Avenue of the Americas, 9th Floor
New York, New York 10020

Denise Seastone Kraft
DKraft@eapdlaw.com
K. Tyler O'Connell
toconnell@eapdlaw.com
EDWARDS ANGELL PALMER & DODGE
LLP
919 North Market Street, 15th Floor
Wilmington, Delaware 19801

Rick. S. Miller
RMiller@eapdlaw.com
FERRY, JOSEPH & PEARCE, P.A.
824 North Market Street, Suite 904
Wilmington, Delaware 19801

David S. Eagle
deagle@klehr.com
Kelly A. Green
KGreen@klehr.com
KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP
919N. Market Street, Suite 1000
Wilmington, Delaware 19801

Robert P. Weinstine
RWeinstine@winthrop.com
David M. Aafedt
Joseph M. Windler
JWindler@winthrop.com
WINTHROP & WEINSTINE PA
225 South Sixth Street, Suite 3500
Minneapolis, Minnesota 55402

John J. Murphy
jmurphy@stradley.com
Kevin W. Goldstein
kgoldstein@stradley.com
STRADLEY RONON STEVENS & YOUNG
LLP
300 Delaware Avenue, Suite 800
Wilmington, Delaware 19801

Richard A. Lesser
lesser@divelaw.com
LESSER &ASSOCIATES
423 South Pacific Coast Highway
Suite 206
Redondo Beach, California 90277

Thomas J. Cortazzo
tcortazzo@bhbmlaw.com
BALDWIN HASPEL BURKE & MAYER
LLC
Energy Centre, 22nd Floor
1100 Poydras Street
New Orleans, Louisiana 70163

Joseph C. Schoell
Joseph.Schoell@dbr.com
Todd C. Schiltz
Todd.Schiltz@dbr.com
DRINKER BIDDLE & REATH LLP
1100 North Market Street
Wilmington, Delaware 19801

Geoffrey L. Harrison
gharrison@susmangodfrey.com
Sammy Ford IV
sford@susmangodfrey.com
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002

K.B. Battaglini
BattagliniK@gtlaw.com
GREENBERG TRAURIG, LLP
1000 Louisiana Street
Suite 1700
Houston, Texas 77002